

## APPLYING FOR PROBATE AND ADMINISTRATION

### Application of Part 2

#### 2.1 This Part deals with:

- (a) applying for grants of probate and letters of administration of estates of deceased persons; and
- (b) the grant, if there is no opposition to the application.

[2.1.1] Application This Part deals with non-contentious probate and administration. If, after an application and advertisement under this Part a notice of opposition is received, then Part 3 applies.

### Application for probate

#### 2.2 (1) An application for the grant of probate of the will of a deceased person must:

[2.2.1] Proving the will The application for probate has the effect of confirming the title of the executor which derives from the will. The effect of the grant of probate is described in regs.8, 9, 11, 12 and 14, *Queen's Regulations*.

##### (a) set out:

- (i) the name, last address and occupation of the deceased; and

[2.2.2] How name to be given The full legal name of the deceased ought to be given. Although probate will issue in this name, if it is possible that there exists some property in alternative names, then setting this out in the application is advisable. Aliases and name changes should also be described in the sworn statement in support, as should any discrepancy between the name on the will and the name of the deceased.

[2.2.3] How address to be given The full residential address of the deceased at the time of death should be given. If there is any difficulty about this, the best possible address should be given and the sworn statement should explain that no better address can be given.

- (ii) the date of death; and

[2.2.4] Unknown date of death If the fact of death is known but the exact date of death is unknown, then the application might be inscribed "unknown" and the sworn statement in support should: (1) Explain the circumstances generating the uncertainty; (2) State the last day on which the deceased was seen alive; and (3) State the date on which the body was found.

- (iii) the name and address of the applicant; and

[2.2.5] How name to be given The full legal name of the applicant should be inscribed. If there is any discrepancy between this name and the name contained in the will, then it must be explained in the sworn statement in support. Name changes and aliases should also be dealt with in the sworn statement.

- (iv) an address for service of documents; and

- (b) if not all executors are applying, state why the applicant is applying for the grant; and

- (c) have with it the original will; and
  - (d) have with it a copy of the death certificate or other proof of death; and
  - (e) have with it a sworn statement by the applicant in support of the application.
- (2) The application must be in Form 1.
  - (3) The sworn statement must be in Form 2.
  - (4) If there is more than one executor, each executor applying for probate must make a sworn statement in Form 2.
  - (5) If not all executors are applying for probate, the applicant must:
    - (a) obtain a sworn statement from any executor not applying, setting out why he or she is not applying; or
    - (b) if this is not practicable, include in his or her sworn statement the reasons why it has not been obtained.

#### **Application for administration**

#### **2.3 (1) An application for the grant of administration of the estate of a deceased person must:**

[2.3.1] Appropriate circumstances Letters of administration are granted where a person dies intestate or in the circumstances described in regs.29, 30 and 33, *Queen's Regulations*.

- (a) set out:
  - (i) the name, last address and occupation of the deceased; and
  - (ii) the date of death; and
  - (iii) the name and address of the applicant; and
  - (iv) an address for service of documents; and
- (b) state why the applicant is applying for the grant; and

[2.3.2] To whom grant may be made The grant will usually only be made to a person entitled to property of the deceased, unless special circumstances exist or the consent of those persons entitled is obtained: *In Estate of Slattery* (1909) 9 SR (NSW) 577; *In the Estate of Smith* (1972) 2 SASR 477; *In Estate of Rosenthal* (1933) 50 WN (NSW) 228.

- (c) have with it a copy of the death certificate or other proof of death; and
- (d) have with it a sworn statement by the applicant in support of the application.

[2.3.2] What application and sworn statement should contain See annotations to r.2.2.

**(2) The application must be in Form 3.**

**(3) The sworn statement must be in Form 4.**

#### **Application for administration with the will annexed**

**2.4 (1) An application for the grant of administration of the estate of a deceased person with the will annexed must:**

[2.4.1] Appropriate circumstances This form of grant is made in the circumstances described in regs.28, 31 and 32, *Queen's Regulations*.

**(a) set out:**

**(i) the name, last address and occupation of the deceased; and**

**(ii) the date of death; and**

**(iii) the name and address of the applicant; and**

**(iv) an address for service of documents; and**

**(b) have with it the original will; and**

**(c) state why the applicant is applying for the grant; and**

**(d) have with it a sworn statement by the applicant in support of the application.**

[2.4.2] What sworn statement should contain The matter in para.(c) should usually be the subject of close attention in the sworn statement required by para.(d). The court must be able to see precisely the reason why, if applicable, no executor is applying and what is the interest of the applicant(s) under the will. Mere consent by the executor is probably not sufficient: *Garrard v Garrard* (1871) LR 2 P&D 238. See further the annotations to r.2.2.

**(2) The application must be in Form 5.**

**(3) The sworn statement must be in Form 6.**

#### **Advertisement**

**2.5 (1) After an application has been filed, the applicant must cause an advertisement to be broadcast on the radio in the area where the deceased lived and carried on business.**

**(2) The applicant must also do any other things reasonably necessary to bring the application to the knowledge of anyone who:**

**(a) is entitled to any property of the deceased; or**

- (b) may oppose the grant applied for; or
- (c) is a creditor of the deceased.

**(3) The advertisement must:**

- (a) state that the applicant has applied for probate or administration of the estate of the deceased person, as the case requires; and
- (b) give the applicant's name and an address for service of documents; and
- (c) state that anyone who is opposed to probate or administration of the estate being granted to the applicant must file a Response in an office of the Supreme Court within the time stated in the advertisement; and

[2.5.1] Meaning of "Response" This word is not defined in the Rules. It is used in several places, sometimes with, and sometimes without, a capitalised "R", leading to a little confusion. The formal requirements of a response are detailed in r.3.1.

- (d) state that if no-one files a Response, the Court will grant the probate or administration to the applicant; and
- (e) state that anyone who thinks they are entitled to property of the deceased, or that the deceased owed them money, must contact the applicant or his or her lawyer.

**(4) The advertisement must be broadcast on 3 working days in the same week, at least once in a morning and once in an evening.**

**(5) The advertisement must:**

- (a) be broadcast in Bislama; and
- (b) be in Form 7.

**(6) For subrule (2) the applicant may, for example:**

- (a) cause the advertisement to be published in a newspaper circulating in Vanuatu or elsewhere; and
- (b) cause the advertisement to be broadcast or published in English or French as well as Bislama.

[2.5.2] Extreme urgency In extreme urgency, the court may, using its powers in rr.18.1 and 18.10, CPR, overlook non-compliance with some or all elements of this rule: *Greenway v McKay* (1911) 12 CLR 310.

**If no Response filed**

**2.6 (1) If no response is filed and served on the applicant within 28 days after the advertisement was last broadcast, the applicant must file a sworn statement:**

- (a) stating that the advertisement was broadcast; and
- (b) giving details of the dates and times when it was broadcast; and
- (c) attaching a copy of the text that the applicant believes was broadcast; and
- (d) if the applicant did any other things to comply with subrule 2.5(2), stating what was done and attaching a copy of any information published.

**(2) A sworn statement must be in Form 8.**

**Grant if application not opposed**

**2.7 (1) After the sworn statement about the advertisement is filed, the Court may grant the probate or administration applied for if a person does not oppose the application by filing a response.**

[2.7.1] Discretion There appears to be a residual discretion about whether to make a grant. It may be necessary to consider, for example, the adequacy of family provision, pursuant to s.13(2), *Wills* [Cap 55] regardless of whether any response is filed.

**(2) The grant of probate must be in Form 9, and the grant of administration must be in Form 10 or 11.**

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